

The Honorable James P. Donohue

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

BIOPURE HEALING PRODUCTS, LLC  
*Plaintiff*

v.

WELLNX LIFE SCIENCES, INC. and  
PLATINUM US DISTRIBUTION, INC. d/b/a  
WELLNX LIFE SCIENCES, USA  
*Defendants*

CIVIL ACTION NO.:  
2:17-cv-00470-RSL-JPD

DEFENDANTS' SUBMISSION IN  
SUPPORT OF REQUEST FOR BOND IN  
THE AMOUNT OF \$474,400 USD

**TO THE HONORABLE MAGISTRATE JUDGE:**

Defendants WellNX Life Sciences, Inc. and Platinum Distribution, Inc. d/b/a WellNX Life Sciences, USA (collectively, “Defendants” or “WellNX”), through their undersigned counsel, hereby respectfully provide this Submission in Support of Request for Bond in the Amount of \$474,400.00 USD.

**I. INTRODUCTION**

In order to comply with the Preliminary Injunction (Dkt No. 58), Defendants will incur out-of-pocket costs in the amount of \$474,000 USD to re-label and repackage approximately 200,000 units of existing inventory. Under the applicable law in this Circuit, Plaintiff BioPure Healing Products, LLC (“BHP”) must be required to post a bond in that amount. *See, e.g., LifeScan, Inc. v. Shasta Techs., LLC*, 2013 U.S. Dist. LEXIS 88489 (N.D. Cal. June 23, 2013) (“The Court concludes that a bond should compensate Defendants both for the costs of changing the packaging advertisements at issue and for any profits lost as a result of the injunction.”).

In assessing the amount of the bond, the Court must consider evidence of the financial ramifications of entering a preliminary injunction. *Masters Software, Inc. v. Discovery Communs., Inc.*, 725 F. Supp. 2d 1294, 1308-1309 (W.D. Wash. 2010). Concurrently with this Submission, Defendants provide evidence of their actual, out-of-pocket costs to comply with the Preliminary Injunction. Defendants have approximately 200,000 units of existing inventory with the “BioPure” name on the bottle labels and packaging. It cannot be disputed that the Preliminary Injunction will cause Defendants to incur out-of-pocket costs to re-label and repackage their existing inventory. As described in the declaration of Dana Johnson filed concurrently herewith, those costs will total \$474,000 USD. Consequently, Defendants hereby request that the Court issue a bond in the amount of \$474,400 USD in order to ensure that Defendants are fairly compensated for their hardship and costs of complying with Preliminary Injunction should they ultimately prevail on the merits in this matter.

**II. RELEVANT FACTS**

In an Order dated August 24, 2017, Judge Lasnick, after considering, among other things,

Stephen J. Kennedy  
Attorney at Law  
18214 13th Place W.  
Lynnwood, WA 98037  
(206) 484-1310

the submissions of the parties in connection with Plaintiff's Motion for Preliminary Injunction (*Docket Entry Nos. 20-22, 40-43, 48*), along with the Report and Recommendation of the Honorable James P. Donohue (*Docket Entry No. 49*) (hereinafter, "7/6 R&R"), as well as Defendants' Objections thereto (*Docket Entry No. 54*), granted Plaintiff's Motion for Preliminary Injunction (*Docket Entry No. 58*) (hereinafter, "8/24 PI Order").

The 8/24 PI Order preliminarily enjoined WellNX, effective thirty (30) days from the date of the 8/24 PI Order (i.e., by September 23, 2017).<sup>1</sup> Compliance with the Preliminary Injunction will cause Defendants to suffer substantial harm and out-of-pocket costs. As detailed in the Declaration of Dana Johnson ("Johnson Decl.") filed concurrently herewith, Defendants have approximately 200,000 units of inventory of SLIMQUICK® Pure Products<sup>2</sup> with the BioPure green tea™ designation on the label and package remaining on hand. Johnson Decl. at ¶3. In order to comply with the Preliminary Injunction, Wellnx is required to re-label and re-box those 200,000 units. That process requires buying new bottles (as the process of removing the label, essentially, renders the old bottles useless), new labels and new boxes. *Id.* These hard costs and labor are as follows:

- 1) Costs of existing bottles, labels, and packages that must be destroyed (\$86,000);
- 2) Costs of new bottles, labels and packages (\$86,000);
- 3) Labor costs to un-package and repackage the inventory (\$182,000);
- 4) Third-party vendor overage charges (\$70,400); and
- 5) Costs of excess labels, bottles, and packaging that were to be used to package and label

<sup>1</sup> The 8/24 PI Order enjoins WellNX from: "[u]sing 'BioPure' or any term or mark confusingly similar to 'Bio Pure', in connection with the advertisement, promotion, distribution, offering for sale or selling of any goods or services involving or relating to tea, including without limitation the use of 'BioPure' in connection with the green tea ingredient of SlimQuick Pure products" and "[p]erforming any acts or using any trademarks, names, words, images or phrases that are likely to cause confusion, to cause mistake, to deceive or otherwise mislead the trade or public into believing that plaintiff or any authorized user of the BIOPURE Mark and defendants are one and the same or are in some way connected or that plaintiff is a sponsor of defendants or that the goods or services of defendants originate with plaintiff or any authorized user of the BIOPURE Mark or are likely to lead the trade or public to associate defendants with plaintiff" (hereinafter, "Preliminary Injunction").

<sup>2</sup> All capitalized terms, unless otherwise indicated, shall be given the definition set forth in Defendants' Opposition to Plaintiff's Motion for Preliminary Injunction. *Docket Entry No. 40.*

1 products, but now must be destroyed. *See* Johnson Decl. at ¶¶4-8 and Exhibits A-B. The total  
 2 amount of these out-of-pocket costs to comply with the Preliminary Injunction is \$474,400 USD.  
 3 *Id.* at ¶8.

4 Per the 7/6 R&R, WellNX conferred with Plaintiff BHP regarding the harm that WellNX  
 5 will suffer as a result of the Preliminary Injunction and the appropriate bond; however, the  
 6 parties have been unable to reach an agreement on the monetary value of the bond.

### 7 **III. ARGUMENT**

#### 8 **A. Legal Standard for Issuance of Bonds**

9 Under Federal Rule of Civil Procedure 65(c), a court is empowered to issue a preliminary  
 10 injunction, but only so long as “the movant gives security in an amount that the court considers  
 11 proper to pay the costs and damages sustained by any party found to have been wrongfully  
 12 enjoined or restrained.” In setting the appropriate amount of security, a court has “wide  
 13 discretion”. *Masters Software, Inc. v. Discovery Communs., Inc.*, 725 F. Supp. 2d 1294, 1308  
 14 (W.D. Wash. 2010). However, “the court must consider evidence of the ‘potential financial  
 15 ramifications of entering a preliminary injunction.’” *Id.* at 1308-1309, quoting *Walczak v. EPL*  
 16 *Prolong, Inc.*, 198 F.3d 725, 733 (9th Cir. 1999).

#### 17 **B. Defendants Will Suffer Substantial Harm and Out-of-Pocket Costs as a** 18 **Result of the Wrongfully Issued Preliminary Injunction**

19 In assessing the proper bond amount in cases involving claims of intellectual property  
 20 infringement, and particularly in the trademark infringement context, courts within the Ninth  
 21 Circuit have considered the following factors, among others: the defendant’s tangible costs  
 22 incurred as a result of the injunction, including, without limitation, the costs of re-branding  
 23 and/or a change in name, the design and creation of new advertising and packaging, and the  
 24 shipment and storage of new and remaining inventory; defendant’s investment in its brand and/or  
 25 product; and defendant’s lost sales resulting from the issuance of the injunction. *See, e.g.*,  
 26 *LifeScan, Inc. v. Shasta Techs., LLC*, 2013 U.S. Dist. LEXIS 88489 (N.D. Cal. June 23, 2013)  
 27 (“The Court concludes that a bond should compensate Defendants both for the costs of changing  
 28

the packaging advertisements at issue and for any profits lost as a result of the injunction.”); *Well Care Pharmacy II, LLC v. W' Care, LLC*, No. 2:13-cv-00540-GMN-VCF, 2013 U.S. Dist. LEXIS 89771 (D. Nev. June 24, 2013) (in amount of bond, the court considered that defendants would be required to re-brand its store with a new name and incur costs associated with replacing signage, along with expenditures on advertising); and *Moroccanoil, Inc. v. Zotos Int'l, Inc.*, 230 F. Supp. 3d 1161 (C.D. Cal. 2017) (Court considered the tangible costs that the defendant would incur as a result of the preliminary injunction, including “costs to (a) ship its product currently in . . . stores and distribution centers, and (b) store current . . . products that could potentially be re-sold.”); *see also Cybermedia, Inc. v. Symantec Corp.*, 19 F. Supp. 2d 1070, 1079-80 (N.D. Cal. 1998) (a computer software copyright infringement action wherein the court considered the profits that defendants would have earned on sales during the period of the injunction; out-of-pocket expenses related to promotion of the defendant's infringing product; damage to defendants’ reputation; and expenses associated with the recall of the infringing product).

Here, Defendants have provided tangible evidence in support of the out-of-pocket costs that they will incur to comply with the Preliminary Injunction. *See generally* Johnson Decl. Specifically, Wellnx will be required to re-label and re-box 200,000 units of existing inventory. Johnson Decl. at ¶3. That process requires buying new bottles (as the process of removing the label, essentially, renders the old bottles useless), new labels and new boxes. *Id.* The total amount of Defendants’ out-of-pocket costs to comply with the Preliminary Injunction is \$474,400 USD. *See* Johnson Decl. at ¶¶4-8; Exs. A-B. Accordingly, the bond amount must include the Defendants’ costs of the injunction. *See, e.g., Korum Auto. Grp., Inc. v. Salstrom Motors Inc.*, No. CV11-5690BHS, 2012 WL 135414, at \*4 (W.D. Wash. Jan. 17, 2012) (ordering \$100,000 bond to cover “the expenses Defendants are likely to incur in complying with this injunction”). For instance, in *CytoSport, Inc. v. Vital Pharm., Inc.* the court the considered similar compliance costs for a company to repackage and dispose of its current inventory of dietary supplement products and set the bond at \$500,000. *CytoSport, Inc. v. Vital Pharm., Inc.*, 617 F. Supp. 2d 1051 (E.D. Cal. 2009).

1 Additionally, a bond in the amount of \$474,400 USD is not only appropriate in light of  
 2 the evidence of Defendants' out-of-pocket costs, but also is commensurate with bonds that have  
 3 been ordered in other intellectual property cases in this Circuit. *See, e.g., Topline Corp.*, 2007  
 4 U.S. Dist. LEXIS 58983 (court ordered posting of \$1 million bond); *OTR Wheel Eng'g, Inc. v.*  
 5 *W. Worldwide Servs.*, No. CV-14-085-LRS, 2014 U.S. Dist. LEXIS 67634 (E.D. Wash. May 14,  
 6 2014) (\$1.8 million bond); *LifeScan, Inc.*, 2013 U.S. Dist. LEXIS (\$3,684,776 bond); *see also*  
 7 *Cybermedia, Inc.*, 19 F. Supp. 2d 1070 (\$ 1.63 million bond). In sum, it is clear that the bond  
 8 Defendants seek is just and proper under the circumstances of this case, particularly given the  
 9 evidence on the record, as well as the evidence submitted herewith.

#### 10 IV. CONCLUSION

11 For the foregoing reasons, Defendants respectfully submit that Plaintiff should be  
 12 required to post a bond in the amount of \$474,400 USD in light of the harm and out-of-pocket  
 13 costs that Defendants will suffer as a result of the issuance of the Preliminary Injunction.

14 Dated: September 7, 2017

Respectfully submitted,

15 BY: /s/ Stephen J. Kennedy  
 16 Stephen J. Kennedy, WSBA #16341  
 17 [stevekennedy3161@gmail.com](mailto:stevekennedy3161@gmail.com)  
 18 18214 13th Place West  
 19 Lynnwood, WA 98037  
 20 Telephone: 206-484-1310  
 Attorney for Defendants

21 **EPSTEIN DRANGEL LLP**  
 Jason M. Drangel (JD 7204)  
[jdrangel@ipcounselors.com](mailto:jdrangel@ipcounselors.com)  
 22 Ashly E. Sands (AS 7715)  
[asands@ipcounselors.com](mailto:asands@ipcounselors.com)  
 23 Kerry B. Brownlee (KB 0823)  
[kbrownlee@ipcounselors.com](mailto:kbrownlee@ipcounselors.com)  
 24 60 East 42nd Street, Suite 2520  
 New York, NY 10165  
 25 Telephone: 212-292-5390  
 Facsimile: 212-292-5391  
 26 Attorneys for Defendants,  
 Pro Hac Vice

27  
 28  
 Stephen J. Kennedy  
 Attorney at Law  
 18214 13th Place W.  
 Lynnwood, WA 98037  
 (206) 484-1310

**CERTIFICATE OF SERVICE**

I hereby certify that on September 7, 2017, I caused the foregoing document to be filed with the Clerk of the Court via the CM/ECF system, which will send notification of such filing to the following counsel of record:

Marc C. Levy: [MarcL@SeedIP.com](mailto:MarcL@SeedIP.com)

Thomas Shewmake: [TomShewmake@SeedIP.com](mailto:TomShewmake@SeedIP.com)

Dated: September 7, 2017

BY: /s/ Stephen J. Kennedy  
Stephen J. Kennedy, WSBA #16341

Stephen J. Kennedy  
Attorney at Law  
18214 13th Place W.  
Lynnwood, WA 98037  
(206) 484-1310